Petition

81-944

NO. .....

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEVEN JOB,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioner was denied due process in that he was improperly induced by the outrageous and unconscionable behavior of government agents who originated, conceptualized and engineered the entire plan.

2. Whether the conduct of the government agents was particularly outrageous and reprehensible in that there never was any contraband or controlled substance in existence providing an objective basis for the commission of a crime.

PARTIES TO THE PROCEEDING

JACK WILBUR TAVELMAN and STEVEN JOB (petitioner herein) were indicted on August 9, 1979, in the District of Nevada, and a three-day trial in the United States District Court for the District of Nevada, commencing January 16, 1980, resulted in convictions of both defendants. Defendants appealed, and on July 13, 1981, the appeals were affirmed in part and vacated in part by the United States Court of Appeals for the Ninth Circuit. Petitioner's co-defendant, JACK WILBUR TAVELMAN, has also filed a Petition for Writ of Certiorari in this same matter (C.A. No. 80-1128).

SHELLY SILVERMAN was initially indicted and charged with the same two counts as JOB and TAVELMAN. In plea negotiations with the government, however, the charges against SILVERMAN were dropped to a misdemeanor, in exchange for his testimony against the remaining co-defendants.

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ON WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner, STEVEN JOB, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed July 13, 1981, case number 80-1129. In this case, the Ninth Circuit issued an opinion in conflict with the United States

Courts of Appeals for the Third and D.C. Circuits in *United States v. Twigg*, 588 F.2d 373, 378-80 (3d Cir. 1978), and *United States v. Borum*, 584 F.2d 424, 427-30 (D.C. Cir. 1978), with respect to substantial and serious issues of outrageous and unconscionable behavior on the part of government agents in violation of the Fifth Amendment right to due process, under circumstances where no objective basis existed for the commission of a crime. It is therefore respectfully submitted that the Petition for Writ of Certiorari should be granted so that a resolution of these conflicting approaches may be obtained.

OPINIONS BELOW

The Judgment and Commitment Order of the United States District Court for the District of Nevada was filed and entered on February 25, 1980, and a copy of said order appears in the appendix hereto as Appendix "A." The opinion of the Court of Appeals for the Ninth Circuit was filed July 13, 1981, and a copy of said opinion appears in the appendix hereto as Appendix "B." On September 25, 1981, a timely Petition for Rehearing was denied and a suggestion for rehearing en banc was rejected, and a copy of the Order denying rehearing and rejecting rehearing en banc appears in the appendix hereto as Appendix "C."

JURISDICTION

The Judgment and Commitment Order of the United States District Court filed and entered February 25, 1980 (Appendix "A"), sets forth petitioner's conviction of conspiracy to possess with intent to distribute a controlled substance in violation of

21 U.S.C. § 846 (Count I), and interstate travel in aid of racketeering enterprise in violation of 18 U.S.C. § 1952(a)(3) (Count II). The Court of Appeals for the Ninth Circuit, by opinion filed July 13, 1981 (Appendix "B"), affirmed petitioner's conviction, and by order dated September 25, 1981 (Appendix "C") denied petitioner's Petition for Rehearing and rejected petitioner's suggestion for rehearing en banc. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1234(1) and Rule 20 of the Rules of the Supreme Court. The petition is timely, being filed within sixty days of September 25, 1981, the date on which petitioner's Petition for Rehearing in this matter was denied.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On August 9, 1979, Indictment No. CR-R-79-39-HEC was filed in the United States District Court for the District of Nevada, charging petitioner, STEVEN JOB, and his co-defendant, with one count of conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846, and one count of interstate travel in aid of racketeering enterprise, in violation of 18 U.S.C. § 1952(a)(3).

Various pretrial motions were filed on behalf of petitioner and co-defendant TAVELMAN. On November 19 and 20, 1979, hearings were held on petitioner's motion to suppress

evidence. The court ordered suppressed certain items illegally seized in violation of the Fourth Amendment.

Trial of the matter commenced on January 16, 1980, before the Honorable Edward C. Reed. Petitioner was found guilty of both charges and was sentenced, on February 25, 1980, to serve eight years in custody on Count I, plus a special parole term of three years, and on Count II to serve four years consecutively with Count I.

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit, which court, on July 13, 1981, entered its judgment affirming the conviction on each count. Based upon the recent United States Supreme Court decision in *Bifulco v. United States,* 447 U.S. 381, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980), petitioner's special parole term was vacated.

The facts produced before the District Court indicated that on July 20, 1979 petitioner was arrested in the hallway of the MGM Grand Hotel in Reno, Nevada. Petitioner had come to Reno, Nevada, on that occasion at the request of a government agent, Bruce Baron, who offered to sell him a large quantity of cocaine. Baron, in fact, had no cocaine for sale.

The entire incident was initiated when Mr. Baron contacted Dennis Cameron of the Federal Drug Enforcement Administration in Reno, Nevada, while Baron was incarcerated in the Douglas County Jail. Mr. Cameron went to the jail to interview Baron, who explained that he was an alcoholic and was in jail because of a fight with a police officer. Baron also described his past involvement in the distribution of narcotics, primarily cocaine.

Although Baron resided in Reno, he offered to go to

Los Angeles, California, and supply information to the government regarding cocaine trafficking there. Baron supplied Cameron with a list of names of persons who were allegedly involved in narcotics distribution.

Several weeks later, while Baron was out on bail, he went to Cameron's office and again offered his assistance. Cameron informed him that the list did not appear to be useful to the Reno office, but that he would arrange for Baron to meet D.E.A. agents in Los Angeles, who might pursue the investigation from there. The Los Angeles office, however, was uninterested in Baron's assistance.

Baron returned to Nevada during the first week of July, 1979, and entered an alcohol rehabilitation program (which he never completed) in lieu of felony or misdemeanor charges. He contacted Agent Cameron and told him that he had met several persons in Los Angeles who appeared to be looking for a source of supply for cocaine. Baron placed four telephone calls to Los Angeles from the D.E.A. office in Reno, and it was determined that Baron should return to Los Angeles and meet with these people.

Baron returned to Los Angeles on approximately July 11, 1979, taking with him a photograph taken in the D.E.A. office showing him holding several large bags filled with white powder, giving the appearance of large amounts of cocaine available for sale. In fact, the substance in the photograph was procaine and not cocaine. The D.E.A. agent emphasized that the agency was about to embark on what he called a "unique situation," "a novel approach" to the problem, as the agency was deviating from its usual method of undercover work which involved the purchase rather than the sale of cocaine.

Baron repeatedly contacted Agent Cameron from Los

Angeles and informed him that he had met an individual named Shelly Silverman, who he hoped could introduce him to other persons involved in trafficking.

Silverman made a number of calls to petitioner at his home in North Hollywood, and attempted to entice petitioner over a period of approximately four days with discussions about the possibility of flying to Reno and purchasing some very good cocaine from a large dealer (Baron).

Silverman, in his testimony, described petitioner's initial response as "real leery." However, Silverman pointed out many details about the quality of the cocaine for sale, including discussion about its burning and melting qualities and inexpensive price. Petitioner, however, conveyed to Silverman a lack of interest in purchasing. Silverman described the negotiations as follows:

> " . . . it seemed that at one point it was on, at one point it was off, at one point he was interested, but then because of technical difficulties of getting it together and not wanting to fly up to Reno, Bruce [Baron] offered to pay all his expenses, and if he wasn't happy, he could fly back and nothing gained, nothing lost and that brought his interest . . . . "

Silverman further indicated that he was attempting to be a "high pressure salesman . . . to try to get him to go for it," because Silverman was to get a commission of $100 an ounce, which he needed desperately. Baron and Silverman spent about three days together and also discussed cocaine sales with a person named Tony Tonkowicz, or "Tea Bags."

The court allowed Silverman, over objection, to describe in detail a prior transaction he, petitioner and "Tea Bags" had

engaged in approximately one month earlier. Silverman testified that prior to that time he had never been involved in situations involving large amounts of cocaine. This prior incident was *the only one* introduced into testimony.

Silverman was initially indicted and charged with the same two counts as JOB and TAVELMAN. In plea negotiations with the government, however, the charges against Silverman were dropped to a misdemeanor, in exchange for his testimony against the remaining co-defendants. Baron received approximately $3,000 from the D.E.A. for his endeavors.

Silverman testified that on the third day which Baron and he spent together, they went to Woodland Hills. Silverman decided to call petitioner "one last time," in his desperation to make money. He characterized their dealings up to then in the following terms:

> " . . . there didn't seem to be much interest. Up to then the last phone call I had with him he was going to shy it off; in other words, I'm not sure, or I'm not going to do it."

Finally JOB told Silverman and Baron to come over to his house. After an introductory period of socializing, during which time Baron indulged in some cocaine, he and JOB discussed the quality and price of the cocaine Baron allegedly had for sale. No conditions or business arrangements were agreed upon. However, they did exchange telephone numbers for possible use in the future. Silverman said that Baron was supposed to call JOB again the next day.

Baron returned to Reno after three or four days in Los Angeles. He informed Cameron that he had brought JOB's telephone number with him. Baron claimed that JOB was *not* interested in purchasing cocaine.

Thereafter, however, six telephone calls were made by Baron from the D.E.A. office in Reno to JOB in Los Angeles. One call was made on July 17, 1979, and five from morning until evening on July 19, 1979. These conversations were initiated by the D.E.A.; JOB made *no* calls to Baron. In addition, many more calls than six were made to JOB at the instigation of the D.E.A. Specifically, numerous calls were made by Silverman at Baron's urging. JOB testified at the preliminary hearing that he received from 20 to 25 calls from Baron. Many of these conversations did not involve discussion of drugs, but of entertainment and women in Reno should JOB come there.

At the end of their last taped conversation, Baron stated that he expected an apology for "all of this hassle" JOB had caused him. Evidence regarding the negotiations and telephone conversations between Baron and petitioner revealed that JOB was reluctant throughout the entire incident to come to Reno. Baron had to continually offer to lower the price to make the deal interesting.

Further, Baron's conversations with JOB emphasized the notion that women would be available in Reno should JOB come there, and that Baron's wife, known to be quite beautiful, would also be in Reno. In addition, the government made arrangements to pay for a hotel room for petitioner at the MGM Grand Hotel and promised to reimburse him if the product was unsatisfactory, as further inducements to come to Reno. JOB finally agreed to come the next day. JOB mentioned that a friend named Jack, who was an accountant (allegedly TAVELMAN) would come with him to Reno. However, even after this final conversation, Baron was still uncertain whether he and JOB had an agreement or not, for he called JOB's house on July 20 and, when there was no answer, checked with the

airlines and then with the MGM Grand Hotel to see if JOB had ever arrived in the room the D.E.A. had reserved for him. Baron finally reached JOB in that room.

Agent Cameron's plan was to have JOB meet Baron in the bar of the MGM Grand Hotel, where Baron was to show him a brief case containing two bags of procaine and effect a transfer of money. Thereupon, an arrest was to occur.

Baron and JOB did meet in the bar, but JOB indicated he had half of the money in his room and that the other person had the other half in a room on the floor above him. JOB took Baron to his room and showed him $24,000 in cash. Baron and JOB returned downstairs to retrieve the brief case. They then proceeded to the elevator to go to the other person's room. Several agents were also on the elevator. Upon exiting, Baron and JOB began to walk down the hallway. JOB, however, became nervous. At that point, Cameron identified himself and arrested JOB. The agents then proceeded to the other person's room, where TAVELMAN was eventually placed under arrest.

REASONS FOR GRANTING A WRIT

I. Petitioner was denied due process in that he was improperly induced by the outrageous and unconscionable behavior of government agents who originated, conceptualized and engineered the entire plan.

II. The conduct of the government agents was particularly outrageous and reprehensible in that there never was any contraband or controlled substance in existence providing an objective basis for the commission of a crime.

ARGUMENT

I

Petitioner Was Denied Due Process In That He Was Improperly Induced By The Outrageous And Unconscionable Behavior Of Government Agents Who Originated, Conceptualized And Engineered The Entire Plan.

The history of the justice system in our society reveals a long-standing commitment to human rights and human dignity, and to a system of criminal law based on consideration of due process and respect for the canons of decency and fairness. *Rochin v. People of California*, 342 U.S. 165 (1952). Due process of law embodied in the Fifth Amendment is "a summarized constitutional guarantee of respect for those personal immunities which are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' [citation], or are 'implicit in the concept of ordered liberty' [citation]." *Rochin, supra,* at 208. In *Rochin,* the United States Supreme Court invalidated a conviction based on evidence obtained in a manner which was shocking to human reason and conscience, and offended "a sense of justice." *Id.* at 209-210. The Court noted that due process of law requires in each case "an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims [citation], on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Id.* at 209. The need to enforce the law must

be balanced against the community's sense of fair play and decency. Were the law to be cloaked in shocking and morally reprehensible conduct, it would soon be discredited and "brutalize the temper of a society." *Id.* at 210. These same considerations and ethical and moral principles regarding the conduct of government underlay the development of the law regarding entrapment. When police officers participate in criminal activity to an intolerable degree, ostensibly to prevent violations of law, but, instead, serving to create further crime, such conduct has been held repugnant to the American criminal justice system and contrary to public policy. *Sorrells v. United States,* 287 U.S. 435, 444 (1932); *Sherman v. United States,* 356 U.S. 369 (1958).

Thus, principles of due process and the supervisory power of the judiciary over governmental conduct have been interwoven into considerations designed to curb overreaching police activity in the manufacture of crime.

The United States Supreme Court has dealt with the defense of entrapment in four major cases. In *Sorrells v. United States, supra,* a government agent visited defendant's home, represented himself as a veteran of war like the defendant, and asked repeatedly and persistently (three to five times) for some liquor. The agent was the only one of several persons present who asked about securing alcohol. The defendant said he had no liquor, but after continual requests, as well as sentimental reminiscing about their experiences as companions in arms, defendant said he would try to get some liquor. When he returned with some, he was arrested. The Court found this governmental behavior a gross abuse of authority. The Court noted that while the predisposition and criminal design of the defendant were relevant, the critical consideration was whether the alleged offense was com-

mitted at the instance of government officials and whether the offense was the product of the creative activity of the government officials. 287 U.S. at 451.

In the second case, *Sherman v. United States, supra,* 356 U.S. 369, the defendant was induced by the repeated requests of a government informer to supply him with narcotics. The defendant was unwilling from the beginning to do this, but, predicated on the presumed suffering of the informer, finally acquiesced and was thereafter arrested. The Court held that entrapment was established as a matter of law, due to the fact that repeated requests had been necessary to overcome the defendant's initial refusal, and that undue persuasion had been exercised through recurring meetings and conversations regarding mutual narcotics experiences. 356 U.S. at 373. The test for entrapment was whether the criminal design originated with the officials of the government and was implanted in the mind of an unwilling individual, or whether that individual possessed the disposition to commit the alleged offense. 356 U.S. at 371-72. The Court stated that entrapment occurred when the criminal conduct was the product of the creative activity of law enforcement officials. *Id.* In a concurring opinion in *Sherman,* four justices noted that courts refuse to convict an entrapped defendant not because his conduct falls outside the proscription of a statute, but because the methods employed on behalf of the government to bring about conviction cannot be countenanced. 356 U.S. at 380.

The third situation in which the Supreme Court considered the law of entrapment, *United States v. Russell,* 411 U.S. 423 (1973), involved the supplying of an essential ingredient by a government agent for the manufacture of a narcotic substance. In *Russell,* the criminal enterprise of unlawfully manu-

facturing the drug was already in process when the agent entered the scene. Rather than focusing its analysis solely on entrapment, the Court expanded the discussion to incorporate considerations of due process and the courts' supervisory powers, and whether the government's involvement in the crime was so vital and so outrageous as to have violated principles of fundamental fairness as described in *Rochin v. California, supra.* 411 U.S. at 431-32. *Russell* involved the illicit manufacture of drugs and a continuing illegal business enterprise, where infiltration and limited participation in unlawful practices was often a necessary means of investigation. In upholding the defendant's conviction the Court nevertheless reaffirmed the holding in *Sherman:*

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' "
>
> *Id.* at 372, 78 S. Ct. at 820, quoting *Sorrells v. United States, supra,* 287 U.S. at 442, 53 S. Ct. at 212.

It is when the government's deception implants the criminal design in the mind of the defendant that the defense of entrapment comes into play. On the other hand, when the

defendant is predisposed to commit the crime and himself planned its commitment, then the defense of entrapment may not apply.

In *Russell,* the Court noted that the defendant *conceded* that the jury finding as to his predisposition was supported by the evidence. In addition, the defendant was an active participant in an illegal drug manufacturing enterprise which began before the government agent appeared on the scene and continued after he left the scene. Thus, he was not an "unwary innocent," but an "unwary criminal." 411 U.S. at 436.

Finally, in *Hampton v. United States,* 426 U.S. 484 (1976), the defendant was convicted of distributing heroin to a government agent which had been supplied to him by a government informant. The Court was divided on the outcome. In a plurality opinion, three justices held that where the government and the defendant acted in concert with one another, and the defendant conceded or the jury found a predisposition to commit the crime in question, not only was the defense of entrapment unavailable, but a violation of due process could not be claimed, as no protected right of the defendant had been violated. Two justices joined in affirming the conviction, but concluded that *Russell* did *not* foreclose reliance on due process principles in every case where the government was able to prove predisposition. In a dissenting opinion, three justices again proclaimed themselves aligned with the concurring opinion in *Sherman v. United States, supra,* the separate opinion in *Sorrells v. United States, supra,* and the dissent in *United States v. Russell, supra,* all of which held that the proper focus of the defense of entrapment was on the unconscionable methods used by the government to bring about a conviction.

Faced with this lack of agreement, the various Courts of

Appeals have struggled to delineate a standard upon which to base a determination as to whether police conduct in a particular case was so overreaching as to bar prosecution as a matter of due process of law.

The Fifth Circuit, in *United States v. Webster,* 606 F.2d 581 (5th Cir. 1979), noted that although *Russell* required that pre-eminence be given to the predisposition factor, "neither it nor reason requires us to abandon all consideration of the character of police conduct in a given affair." 606 F.2d at 584.

In *United States v. Reynoso-Ulloa,* 548 F.2d 1329 (1977), *cert. denied* 436 U.S. 926 (1978), the Ninth Circuit sought to ascertain the precise meaning of predisposition as delineated in *Sorrells* and *Sherman,* and found that a number of factors must be considered in determining whether the government had implanted the criminal design in an otherwise innocent defendant. The court stated as follows:

> "Among these [considerations] are the character or reputation of the defendant, including any prior criminal record, *whether the suggestion* of the criminal activity *was initially made by the government*; whether the defendant was engaged in the criminal activity for profit; *whether the defendant evidenced reluctance to commit the offense, overcome only by repeated government inducement or persuasion; and the nature of the inducement or persuasion* supplied by the government. While none of the factors alone indicated either the presence or absence of predisposition, *the most important factor,* as revealed by Supreme Court and other decisions, *is whether the defendant evidenced reluctance to engage in criminal activity* which was overcome by

repeated government inducement." 548 F.2d at 1136. (Emphasis supplied.)

The Third Circuit also has employed an analysis similar to the Fifth Circuit with regard to a government agent's supplying of contraband to a defendant. *United States v. West*, 511 F.2d 1083 (3d Cir. 1975); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971). In *Twigg*, a convicted felon agreed to aid the D.E.A. in apprehending illegal drug traffickers. He contacted a former acquaintance and organized the setting up of a laboratory to produce speed. Arrangements were made by telephone, which conversations were recorded and introduced into evidence at trial. The government supplied its informant with essential chemicals, a rented farmhouse, and glassware. The informant purchased all of the supplies for the lab. A second defendant became involved in the operation in order to repay a debt to the other. The laboratory operated for one week, with the government informant in charge.

In reversing a conviction, the court in *Twigg* noted that its decision was not based on the traditional entrapment defense, for *predisposition was shown by the defendant's lack of reluctance to participate and lack of need for inducements.* The basis for the court's decision was the overreaching extent of police involvement such as to constitute "a demonstrable level of outrageousness." 588 F.2d at 380. The court delineated the rule left by *Hampton v. United States, supra,* as follows:

> " . . . although proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not

> permit any defendant to be convicted of a crime in which police conduct was 'outrageous.' See *United States v. Prairie*, 575 F.2d 1316, 1319 (9th Cir. 1978); *United States v. Johnson*, 565 F.2d 179, 181 (1st Cir. 1977). Where the facts can easily be resolved, the validity of the defense is to be decided by the trial court. *United States v. Graves*, 556 F.2d 1319, 1322 (5th Cir. 1977)." 588 F.2d at 379.

In ascertaining whether the police conduct in that particular situation was ourrageous and violative of "fundamental fairness" necessitating reversal, the Court noted the following factors: (1) a convicted felon, striving to reduce the severity of his sentence, had made the initial suggestion; (2) the government originated the illicit plan and supplied the ingredients and other means to facilitate the activities; (3) there was no cost to defendants in the entire operation; (4) at all times the government agent was completely in charge and furnished expertise; and (5) the involvement of defendants was minimal and at the specific direction of the agent. Of vital importance in deciding this constitutional question was "the extent to which the government instigated, participated in, or was involved or enmeshed in, the criminal activity itself." *United States v. Szycher*, 585 F.2d 443, 447 (10th Cir. 1978), citing *United States v. Spiney*, 508 F.2d 146 (10th Cir. 1975), *cert. denied* 421 U.S. 949.

Other Circuits as well have wrestled with the question of the necessary level of police overreaching required in order to find a violation of due process.

The D. C. Circuit found such behavior in *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978). where government agents induced the defendant to sell them guns through repeat-

ed requests some 20 times. The court held that while the principal element in the defense of entrapment might be the defendant's predisposition, this did not totally subsume the question of inducement, which illuminated one critical, additional element of the entrapment defense: instigation of the criminal act by government agents. 584 F.2d 425-27. Of concern to this court was the fact that in that case the agents had asked the defendant about guns some twenty times, while in *Sorrells* the Supreme Court found inducement upon three to five requests, and in *Sherman* initial reluctance and later accession to repeated importunings were fundamental and material.

In most, if not all, of the recent cases where conviction has been affirmed involving a claim of entrapment or violation of due process through outrageous police conduct, the defendant himself either initiated the criminal activity, never refused the government offer, was involved in the planning of production and distribution of the contraband, or made the initial offer to the government agent. *United States v. Perez*, 600 F.2d 782 (10th Cir. 1979); *United States v. Williams*, 613 F.2d 560 (5th Cir. 1980); *United States v. Corcione*, 592 F.2d 111 (2d Cir. 1979); *United States v. Brooks*, 567 F.2d 134 (D.C. Cir. 1977); *United States v. Szycher, supra; United States v. Leja*, 573 F.2d 244 (6th Cir. 1977); *United States v. Reifsteck*, 535 F.2d 1035 (8th Cir. 1976); *United States v. Esquer-Gomez*, 550 F.2d 1231 (9th Cir. 1977). Where the defense has been upheld, these elements have generally been negated. In determining the question of predisposition underlying the decision as to whether an entrapment defense is available, the Ninth Circuit has suggested that "evidence that government agents participated in a criminal scheme, and in fact suggested it, and

even supplied the contraband, is of course highly relevant." *United States v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976). In *United States v. Gonzales*, 539 F.2d 1238 (9th Cir. 1976), the Ninth Circuit further noted that while it was not improper for law enforcement agents to infiltrate criminal rings and gain the confidence of the participants, nor impermissible to supply some item of value toward the perpetration of the crime, if the agents *engineered and directed the criminal enterprise from start to finish*, such extreme conduct could arguably constitute a due process violation. 539 F.2d at 1240.

Based on the foregoing discussion, it is clear and indisputable that the government conduct in the instant case was outrageous and violative of the Fifth Amendment. Here, the government agents originated, conceptualized and planned the *entire scheme*. There was *no ongoing criminal enterprise* which they simply infiltrated. No prior criminal record of either defendant was shown. As in *Sorrells*, the agent here *asked repeatedly* (there, three times; here, well over twenty-five) for the defendant to become involved. Here, as in *Sorrells*, *Sherman* and their progeny discussed above, petitioner was extremely reluctant and unwilling to participate, which indicates lack of predisposition to commit the particular crime. The agent had to lure him out of the State through continual telephone calls, promises of women, gambling, fun and entertainment, as well as outright lies about the *very existence* of contraband and its unbelievable quality and price. The government agent promised petitioner there would be no cost to him; the government would *pay for and take care of everything*.

The instant case also evidences amazing similarity to the Third Circuit case of *United States v. Twigg*, *supra*, where a

violation of due process was found. There and here, a convicted criminal made the initial suggestion, agreed to aid the D.E.A., and contacted a former acquaintance. There and here, the government agent organized the project and made arrangements by telephone, which conversations were recorded and introduced into evidence at trial. There was no cost to the defendants in either case. At all times the agent was completely in charge and furnished expertise. There and here, the government supplied (or pretended to supply) the essential element or contraband. There, the court found the entrapment defense unavailable because the defendant showed *no reluctance* and there was no need for any inducements, but did find the police conduct outrageous. Here, there was extreme reluctance and unwillingness and the use of many inducements upon defendant. The involvement of defendants in each case was minimal and at the specific direction of the agent. Petitioner *actually rejected* the offer of the government agent and had to be lured, on total pretext, to Reno from California, where he otherwise had no intention of going. In the face of such reluctance and rejection, it is difficult to be persuaded that petitioner was "predisposed" to commit this crime. Finally, and most heinously, the government was to supply the contraband itself. Were this a case in the Fifth, Third or D. C. Circuit, the law would be clear that such conduct may not be condoned. *United States v. Bueno, supra; United States v. Oquendo,* 490 F.2d 161 (5th Cir. 1974); *United States v. Mosley,* 496 F.2d 1012 (5th Cir. 1974); *United States v. Graves, supra; United States v. West, supra; United States v. Twigg, supra; United States v. Borum, supra.* Even in the Ninth Circuit the law is clear that government agents may not engineer and direct the criminal enterprise from start to finish. *United States v. Gonzales, supra.* Nor may they lure

an individual from one jurisdiction to another in order to arrest him. *Carbajal-Portillo v. United States,* 396 F.2d 944 (9th Cir. 1968). In *Carbajal-Portillo,* the court found that the defendant would not have crossed into California from Mexico but for the persuasion, deceitful representations and inducement by the agent. The similarities to the instant case are startling.

The Circuits have basically split in their approach to this problem. As noted in the opinion of the Ninth Circuit Court of Appeals (Appendix "B"), the Third and D. C. Circuits have held police overreaching in initiating criminal activity against a reluctant and uninvolved individual a denial of due process in situations similar to the case at bar. *United States v. Twigg, supra; United States v. Borum, supra.* The Ninth Circuit should follow a similar approach in situations where the government engineers and facilitates the entire criminal operation from start to finish and the record is replete with instances of overreaching and shocking behavior, as the court notes was *supported by the record here.* The Court of Appeals did not dispute the fact that the pretense of selling a non-existent substance was a novel approach for the government. However, it felt that the government's conduct did not approach the standard of outrageousness held by the Third and D. C. Circuits to be sufficient to constitute an invalid conviction.

Petitioner contends that this is precisely the kind of prohibited police conduct that should be discredited by this Court as shocking and morally reprehensible and contrary to due process and the best interests of our society.

II

The Conduct Of The Government Agents Was Particularly Outrageous And Reprehensible In That There Never Was Any Contraband Or Controlled Substance In Existence Providing An Objective Basis For The Commission of A Crime.

The Court of Appeals failed to note the implications of the fact that no controlled substance was in existence, and therefore, there was no basis for the commission of any crime. Illustrative of the reprehensible nature of the conduct involved here is the fact that not only was the government initiating a novel approach of selling cocaine, but there never was any cocaine to sell. The crime could not possibly have been committed, as there was no contraband in existence as part of any conspiracy.

The statute prohibiting conspiracies is the same as that prohibiting attempts to commit criminal acts, 21 U.S.C. § 846, which reads as follows:

> "Attempt and Conspiracy.
>
> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The discussion of impossibility as a legal defense has generally taken place in the context of attempt situations, but as both are prohibited by the same statute and may be similarly incompleted crimes, the same arguments are relevant to both situations. The charge in the instant case could be

characterized as conspiracy to attempt to buy cocaine.

A variety of approaches have been taken by the various state and federal courts when a defendant is charged with attempt but it would have been legally or factually impossible to complete the crime. See cases collected in *United States v. Brooklier*, 459 F. Supp. 479 (D.C. Cal. 1978); *United States v. Deangelis*, 430 F. Supp. 327 (D.P.R. 1976); and *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976).

In *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), the Third Circuit ruled that a defense of impossibility[1] was available in attempt cases. In that case, the court found that since a necessary element of the offense was missing, "attempting to do that which is not a crime is not attempting to commit a crime." *Berrigan* at 190. The crime of which the defendants were charged, attempt to smuggle objects into and out of federal prison, required lack of knowledge by the Warden. Since the Warden knew, this precluded conviction for attempt.

The court in *Berrigan* noted that intent was not the sole criterion to be considered in determining criminal responsibility, particularly since it is not subject to direct proof but must

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[1] Historically, some courts have made the distinction between "factual impossibility" and "legal impossibility," the former being defined as occurring "when the objective of the defendant is proscribed by the criminal law, but a circumstance unknown to the actor prevents him from bringing about that objective," and the latter "when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime." *United States v. Oviedo, supra*, at 882. However, this area of legal theory is plagued with inconsistency, so that many courts reject any artificial distinction between these two defenses. *United States v. Hair*, 356 F. Supp. 39 (D.C. D.C. 1973).

be proved by circumstantial evidence, and is the subject of inference and speculation not open to direct refutation. 482 F. 2d at 189, n. 39. Thus, the court emphasized the necessity for maintaining the requirement that there be an objective basis for measuring criminal activity. *The will was not to be taken for the deed.*

An opposite approach was taken by the Second Circuit in *United States v. Heng Awkak Roman*, 356 F. Supp. 434 (S.D. N.Y. 1973), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), where defendants thought they were transporting a suitcase containing heroin. Unknown to them, through the aid of an informer, the contents of the suitcase were replaced with soap powder. The defendants thereafter sold the soap powder and were arrested for attempted possession with intent to distribute heroin. The court concluded that because the objective of the defendants was criminal, factual impossibility existed and was not a defense. The approach here was followed by the Second Circuit in *United States v. Marin*, 513 F.2d 974 (2d Cir. 1975), where government agents again faked the existence of drugs. However, these two cases may be distinguished from the case at bar, for there *the defendants exercised dominion and control over the fake substance*, in one instance soap powder and in the other a mixture of quinine, starch and cocaine. In the instant case, the government exercised total dominion and control over the supposed contraband, its own procaine.

An approach somewhere between *Berrigan* and *Roman* was taken by the Fifth Circuit in *United States v. Oviedo, supra.* There, the defendant sold procaine, an uncontrolled substance, to a government agent in order to "rip him off," and was charged with attempting to dis-

tribute heroin. The court held that this situation might be easily characterized as either legal or factual impossibility, and, thus, these distinctions were not particularly helpful. The court ruled that in order for a defendant to be found guilty of criminal attempt, the objective acts performed, *without* any reliance on the accompanying intent, must mark the defendant's conduct as criminal in nature.

In *Oviedo*, there were only two objective acts: Oviedo told the agent that he was selling him heroin, and the substance was concealed in a TV set. The court said:

> "If another objective fact were present, if the substance were heroin, we would have a strong objective basis for the determination of criminal intent and conduct consistent and supportive of that intent. The test set out above would be met, and, absent a delivery, the criminal attempt would be established. But when this objective basis for the determination of intent is removed, when the substance is not heroin, the conduct becomes ambivalent, and we are left with a sufficiency-of-the-evidence determination of intent rejected in the preparation-attempt dichotomy. We cannot conclude that the objective acts of Oviedo apart from any indirect evidence of intent mark his conduct as criminal in nature. Rather, those acts are consistent with a non-criminal enterprise. Therefore, we will not allow the jury's determination of Oviedo's intent to form the sole basis of a criminal offense . . . . " 525 F.2d at 886.

Fifth Circuit cases following the decision in *Oviedo* have

generally looked for sufficient objective acts to strongly corroborate a defendant's subjective intent to commit a crime. *United States v. Korn*, 557 F.2d 1089 (5th Cir. 1977); *United States v. Hough*, 561 F.2d 594 (5th Cir. 1977).

Ninth Circuit decisions have noted the rulings in *Berrigan, Roman* and *Oviedo* in cases where impossibility is a defense. *United States v. Brooklier, supra; United States v. Quijada*, 488 F.2d 1253 (9th Cir. 1978). The Ninth Circuit has generally agreed with the Fifth Circuit approach in *Oviedo*. *United States v. Brooklier, supra*, at 481. This requires objective acts to unequivocally corroborate the necessary criminal intent.

In the instant case, the objective acts of petitioner included (1) discussions with the agent about the government sale of non-existent commodity, wherein petitioner showed tremendous reluctance and *rejected* the agent's offer (such that the agent described petitioner as "really giving him a hassle"), and (2) using an airline ticket to Reno. These acts are not unique; they are quite commonplace and perfectly consistent with non-criminal behavior. *United States v. Oviedo, supra; United States v. Deangelis, supra.* Thus, in the instant case, there was no objective basis for the determination of intent, as required by *Oviedo*. Petitioner never made an offer to sell any substance, controlled or non-controlled. *United States v. Quijada, supra.* The only objective acts on record were alleged negotiations for the purchase of a non-existent substance. Therefore, in those Circuits following the approach in *Oviedo*, reversal is compelled.

The D. C. District Court in *United States v. Hair, supra,*

was faced with a situation where the defendant was charged with attempt to receive stolen property, but the item (a television set) had not in fact been stolen. The court held that no conviction could be had for an unsuccessful endeavor to do that which is not a crime. In *Hair*, the officer secured a new TV set, which he gave to an informant with instructions to sell it to the defendant and to advise the defendant that it was a stolen set. Thereafter, the defendant was arrested. The court found that no crime had been committed.

The similarity to the case at bar is clear, for here the police officer also was the source of the property which was the subject matter of the crime and which subject matter made it impossible for petitioner to commit the crime.

There is some discussion of the problem of impossibility in cases where the charge is conspiracy rather than attempt. In *United States v. Waldron*, 590 F.2d 33 (1st Cir. 1979), the defendants conspired to import and sell a valuable stolen painting, which turned out to be a forgery. The court found that under the circumstances of that case, a conviction might be had even though the crime which was the object of the conspiracy was impossible to commit. 590 F.2d at 34. This was because the record indicated the advancement of the conspiracy by the defendants by numerous overt acts, including: initiating many telephone calls, taking several trips abroad, and delivering, selling and transporting a painting. The court noted that substantial steps had been taken by the defendants to bring the scheme to fruition.

In the case at bar, however, the defendants had no scheme –the scheme was that of the government. The defendants took no substantial steps toward accomplishing a goal; other than traveling to Reno, nothing else occurred.

On point here is *United States v. Binetti*, 552 F.2d 1141 (5th Cir. 1977), where defendant's conviction for conspiracy to possess and distribute cocaine was reversed when the sale actually involved a non-controlled substance and not cocaine. Reversal occurred *even though* the defendant knew of, but did not participate in, prior drug sales involving the same individuals, and had taken an active role in the particular sale for which he had been arrested.

In the instant case, involving a similar situation of impossibility, no contraband of any kind was exchanged. Neither the defendants nor the government possessed any contraband or non-controlled substance at all. Far from conspiring to "rip off" the government agents, the government agents here conspired to "rip off" the defendants, and then arrested the defendants for conspiring to possess and distribute the government's own procaine. This is precisely the kind of illegal police activity acknowledged by courts as a fundamental danger to be avoided.

Therefore, due to the lack of an objective basis for the commission of a crime and the outrageousness of the police conduct in denial of due process, a reconsideration of petitioner's conviction must be had. This is particularly important in light of the fact that the Ninth Circuit has taken a position and approach different from the Third and D. C. Circuits in such matters. *United States v. Twigg, supra,* 558 F.2d at 378-80 (3d Cir. 1978); *United States v. Borum, supra,* 584 F.2d at 427-30 (D.C. Cir. 1978).

CONCLUSION

This petition presents fundamental issues regarding due

process and government overreaching in the manufacture of crime. Various Courts of Appeals have interpreted the requirements for outrageous police conduct in such situations differently. Petitioner's analysis is consistent with historical and constitutional doctrine. It is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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of

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APPENDIX "A"

JUDGMENT AND COMMITMENT ORDER

In the United States District Court for the District of Nevada.

Docket No. CR-R-79-39-ECR.

UNITED STATES OF AMERICA vs. STEVEN JOB.

[Filed and Entered February 25, 1980]

In the presence of the attorney for the government the defendant appeared in person on this date, FEBRUARY 25, 1980, with counsel, EDWARD L. MASRY . . . there being a finding/verdict of GUILTY as to Cts. 1 & 2.

Defendant has been convicted as charged of the offenses of 21 U.S.C. 846, conspiracy to possess with intent to distribute a controlled substance, Ct. 1; and 18 U.S.C. 1952(a)(3), interstate travel in aid of racketeering enterprise, Ct. 2..

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment as to Ct. 1 for a period of eight (8) years, plus a special parole term of three (3) years in accordance with 21 U.S.C. 960; as to Ct. 2 for a period of four (4) years, to be served consecutively and not concurrently with term of imprisonment imposed in Ct. 1; it is

FURTHER ORDERED that bail is exonerated and sureties released.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation

[not set forth herein] be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends incarceration at Federal Prison facility at Lompoc, California.

EDWARD C. REED, JR.
U. S. District Judge

Dated February 25, 1980.

†

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 80-1128

UNITED STATES of America, Plaintiff-Appellee, v. Jack Wilbur TAVELMAN, Defendant-Appellant.

No. 80-1129

UNITED STATES of America, Plaintiff-Appellee, v. Steven JOB, Defendant-Appellant.

[Argued and Submitted February 9, 1981.
Decided July 13, 1981.]

Appeals from the United States District Court for the District of Nevada.

Before SKOPIL and FARRIS, Circuit Judges, and BELLONI,* District Judge.

FARRIS, Circuit Judge:

Jack Wilbur Tavelman and Steven Job appeal their convictions and sentences for violation of 21 U.S.C. §§ 841(a)(1), 846 (1976) (conspiracy to possess cocaine with intent to distribute) and of 18 U.S.C. § 1952(a)(3) (1976) (Travel Act) (interstate travel with acts in furtherance of intent to distribute cocaine). See 28 U.S.C. § 1291 (1976).

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*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

We affirm except the imposition of special parole terms under 21 U.S.C. § 846 (1976), which we vacate.

I. FACTS

Baron, an inmate at the Douglas County Jail, contacted DEA agent Cameron who accepted Baron's offer to assist the agency in apprehending persons involved in the distribution of narcotics in Los Angeles. When Baron went to Los Angeles in July, 1979, he took a photograph showing him holding several bags filled with white powder giving the appearance of cocaine (but actually procaine). Through one Meekins, middle man, Baron met Silverman, another middle man. Over a period of four days, Silverman made a number of calls to defendant Job, attempting to entice him to fly to Reno to purchase some very good cocaine from a large dealer.[1] During a subsequent meeting at Job's house, Baron and Job discussed the quality and price of the cocaine and exchanged telephone numbers. During this conversation, Job expressed reservations about the proposed purchase because he already had one kilo of cocaine that he was attempting to sell. After three or four days in Los Angeles, Baron returned to Reno and reported that Job was not interested in purchasing cocaine. Over the

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[1] During trial, Silverman testified over objecton to a prior transaction occurring between himself, Tonkowicz ("Tea Bags"), and Job one month before the arrests. Silverman and Tonkowicz had encountered one another at a mutual friend's home. When Tonkowicz showed Silverman a pound of cocaine he had for sale, Silverman telephoned Job and went to Job's home with a small sample. Several days later Silverman and Tonkowicz returned to Job's home, where Job gave Tonkowicz approximately $27,000. Another person at Job's home, identified by Silverman as Tavelman, had gone to the back of the house before the exchange of money.

next few days, however, Baron made six recorded telephone calls from the Reno DEA office to Job in Los Angeles in which he increased the attractiveness of the trip to Reno. In his acceptance, Job mentioned that his friend Jack, an accountant, would travel with him to Reno to analyze the cocaine and would supply half the purchase money.

Job and Tavelman flew to Reno from Los Angeles on July 20, 1979 on Western Airlines flight No. 144. Baron and Job met in the bar of the MGM Grand Hotel. Baron opened his brief case an inch or so to display two plastic 5-lb. bags of powder appearing to be cocaine. Job then took Baron to his room to show him $24,000 in cash, indicating that his friend had the other half of the purchase money in a room on the floor above. Job said that a cocaine laboratory had been set up in the bathroom of his friend's room. Baron and Job returned to the bar, where Baron retrieved his suitcase from Cameron, an alleged compatriot. They then went to the elevator, to go to Job's friend's room to test the cocaine. Several DEA agents got on the elevator with Baron and Job, including Cameron. On leaving the elevator and starting down the hallway, Job asked Baron if he was alone. Cameron, who had left the elevator on the same floor, then arrested Job. Job requested that they return to his room. A pouch containing money was seized and opened when the group returned to Job's room. An airline ticket which fell out of Job's coat was also seized. Approximately $1,000 was taken from Job's person.

Following Job's arrest, agent Cameron attempted to locate Job's partner, "Jack the accountant." The hotel management provided information that the only single man checking in on the same day as Job and occupying a room on the floor above was registered as "Jim Freeman" and was located in room No. 2417.

Cameron proceeded to that room, identified himself to Tavelman as a DEA agent investigating a narcotics arrest occurring earlier, and asked to be admitted. Tavelman admitted Cameron, who was accompanied by four other agents, to the room. In response to Cameron's questions, Tavelman admitted that he was an accountant, had registered under a false name, had $22,000 cash in the room, and had traveled from Los Angeles on the flight known by the agents to have been Job's. Tavelman denied knowledge of or involvement in the narcotics deal under investigation. Tavelman refused Cameron's request to search his bathroom and requested consultation with an attorney. Cameron then arrested Tavelman and read him the *Miranda* warnings. Tavelman's attempts to contact his attorney were unsuccessful. After arrest, Tavelman consented to the search. He took Cameron into the bathroom where a cocaine laboratory was found. He also produced a purse with money in it and some cocaine. Cameron later testified at trial that, during this time, Tavelman had told him that if the cocaine tested out, "they were going to use the money to buy the coke." Later, Job and Tavelman met in the hallway of the DEA office. Job said, "Jack, I see they got you, too. I just want you to know that they didn't get you through me." Tavelman directed his response to Cameron. The parties disagreed on that response: He asked either "How did you get me?" or "How did you get that?"

On August 9, 1979, Tavelman and Job were indicted in the District of Nevada (1) for conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1976) and (2) for interstate travel with intent to distribute cocaine toward which end acts were consummated in violation of 18 U.S.C. § 1952(a)(3) (1976).

Tavelman's and Job's pretrial motions to dismiss under Fed.R.Crim.P. 12(b) were denied in their entirety. Tavelman's motion to suppress evidence obtained from his hotel room, including his statements at that time, was denied in its entirety. At the same pretrial hearing, Job's motion to suppress the pouch and money seized from his hotel room was granted and his motion to suppress the airline ticket was denied. Tavelman's pretrial motion for a hearing to determine the admissibility of confessions, admissions, and assertive conduct, see 18 U.S.C. § 3501 (1976) (motion *in limine*), was also denied.

A three-day jury trial, commencing on January 16, 1980, resulted in convictions of both defendants on both counts of the indictment. At trial, defendants renewed their motions to suppress the statements made by Tavelman in his hotel room regarding the intended use of the money and by Job and Tavelman in the DEA office. The court ruled that Tavelman's statement in the hotel room would be excluded and that Job's and Tavelman's statements in the DEA office would be used only against the codefendant who made them. Later, the court ordered the defendants' statements at the DEA office stricken from the record and admonished the jury to disregard them. Defendants' motions for acquittal at the end of the prosecution's case were denied. The motions for acquittal were converted into motions for mistrial under *Bruton* for the three extrajudicial statements of the defendants. The court denied the mistrial motions but admonished the jury.

On February 25, 1980, Tavelman was sentenced to a five-year term on Count I with a special parole term of three years under 21 U.S.C. § 960 (1976) and to a two-year term, to run concurrently with that on Count I, and a $5,000 fine on Count II. Job was sentenced on the same day to an eight-year term on

Count I with a special parole term of three years under 21 U.S.C. § 960 (1976) and to a four-year term, to run consecutively with that on Count I, on Count II.

II. SUFFICIENCY OF THE INDICTMENTS

An indictment must inform the defendant of "the nature and cause of the accusation." U.S.Const. amend. VI. *Accord,* Fed.R.Crim.P. 7(c)(1); *United States v. Cecil,* 608 F.2d 1294, 1296 (9th Cir. 1979) (per curiam). An indictment which tracks the offense in the words of the statute is sufficient if those words fully, directly, and expressly set forth all the elements necessary to constitute the offense intended to be proved. *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L. Ed.2d 590 (1974). The indictments of Tavelman and Job contained the specific dates of their alleged criminal violations, the statutory provisions under which the indictments issued, and brief descriptions in statutory terms of the nature of the criminal activity alleged.

A. Count I

Count I of the indictments alleged that Tavelman and Job conspired, between July 12 and July 20, 1979, to possess cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1), 846 (1976). Job and Tavelman contend that, although the existence of a substantive count may substitute for a definite statement of essential facts or overt acts, their indictments failed either to contain a substantive count or to allege essential facts or overt acts and were therefore constitutionally defective.

An indictment under 21 U.S.C. § 846 (1976) is sufficient if it alleges:

> a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege or prove any specific overt act in furtherance of the conspiracy.

United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978), *overruled on other grounds, United States v. Rodriguez*, 612 F.2d 906, 919 & n.35 (5th Cir.) (en banc) (by implication), *cert. denied*, ... U.S. ..... , 101 S.Ct. 108, 66 L.Ed.2d 41 (1980). Courts do not require as detailed a statement of an offense's elements under a conspiracy count as under a substantive count. *E.g., Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545 (1927); *United States v. Pheaster*, 544 F.2d 353, 360-61 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977). *United States v. Cecil*, 608 F.2d 1294, 1296-97 (9th Cir. 1979) (per curiam), on which defendants rely, is inapposite. The indictment in *Cecil* did not place the conspiracies in any time frame whatsoever. The Count I indictments were adequate.

B. Count II

Count II of the indictments contained allegations that the defendants, on or about July 20, 1979, traveled from Los Angeles to Reno with intent to promote the unlawful activity of possession with intent to distribute cocaine (in violation of 21 U.S.C. § 841(a)(1) (1976)) and that, on that same day, they committed acts facilitating that unlawful activity in violation of 18 U.S.C. § 1952 (a)(3) (1976). Job and Tavelman contend that their indictments under Count II were fatally defective because they failed to allege

any specific overt acts committed in furtherance of the unlawful intent.

An indictment under the Travel Act requires allegations of each of the three elements of the crime: (1) interstate commerce or use of an interstate facility (2) with intent to promote an unlawful activity and (3) a subsequent overt act in furtherance of that unlawful activity. See, *e.g., United States v. Wander,* 601 F.2d 1251, 1258 (3d Cir. 1979); *United States v. Polizzi,* 500 F.2d 856, 897 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120, 95 S. Ct. 802, 42 L. Ed. 2d 820 (1975). The indictments alleged that on July 20, 1979: (1) the defendants traveled interstate (between Los Angeles and Reno); (2) with the intent to promote a violation of 21 U.S.C. § 841(a)(1) (specifically the possession of cocaine with intent to distribute); and (3) thereafter knowingly performed acts facilitating that unlawful activity. These allegations are sufficient to state violations of 18 U.S.C. § 1952(a)(3). We reject the defendants' contentions.

III. SEARCHES OF THE HOTEL ROOMS

A. The Search of Job's Room

Job concedes that he requested, after his arrest in the hallway, that he and the agents return to his hotel room. He contends, however, that he did not consent to a search of his room and that the search was not supported by probable cause.

Upon conflicting evidence, the trial court found that Job had consented to the agents' entry into his room and that the airline ticket was in "plain view" when it was seized, see generally *Coolidge v. New Hampshire,* 403 U.S. 443, 464-71, 91 S. Ct. 2022, 2037-40, 29 L. Ed. 2d 564 (1971). The record supports

that finding. It is not clearly erroneous. See *United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1962) (en banc) (standard of review for admissibility of evidence).

B. The Search of Tavelman's Room

Tavelman contends that, because the agents' entry into his room was without probable cause, the evidence obtained there should have been suppressed under the Fourth Amendment. We understand but reject the argument. The court could properly find from the record that Tavelman consented to the agents' entry into his hotel room and to their search.

"[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed. 2d 854 (1973). A finding of consent by the trial judge should be reversed only if, viewing the evidence in the light most favorable to the government, this court concludes that it is clearly erroneous. *United States v. Wasserteil*, 641 F.2d 704, at 707 (9th Cir. 1981) (quoting *United States v. O'Looney*, 544 F.2d 385, 388 (9th Cir.), *cert. denied*, 429 U.S. 1023, 97 S. Ct. 642, 50 L. Ed. 2d 625 (1976).

Here, Tavelman gave indicia of consent when Cameron came to his hotel room door and asked to be admitted to question him about a recent narcotics arrest. Tavelman's election to contact his attorney at a time during the interview when he may have reasonably suspected that the investigation was focusing on him demonstrated an understanding of his *Miranda* rights. The burden is on Tavelman to show that the

finding of consent was clearly erroneous. See, *e.g.*, *United States v. Townsend*, 510 F.2d 1145, 1147 (9th Cir. 1975) (per curiam). He fails to carry that burden.

IV. ADMISSIBILITY OF CODEFENDANTS' STATEMENTS

Both defendants contend that the admission of their three extrajudicial statements violated their Sixth Amendment right to confrontation as articulated in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). These three statements, which were admitted into evidence at trial, were later ordered stricken from the record by the district judge who then admonished the jury to disregard them.

Cases subsequent to *Bruton* have distinguished—as admissible—a codefendant's admission which is a vague reference from which guilt might be inferred from other facts and evidence. See, *e.g.*, *United States v. Belle*, 593 F.2d 487, 493-96 (3d Cir.) (en banc), *cert. denied*, 442 U.S. 911, 99 S. Ct. 2825, 61 L. Ed. 2d 277 (1979); *United States v. Wingate*, 520 F.2d 309, 313-14 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074, 96 S. Ct. 858, 47 L. Ed. 2d 84 (1976). Although the statements admitted here did serve to tie Tavelman and Job to one another in the crime, they were not incriminating without reference to other, admissible evidence. Further, even if there was *Bruton* error, it was harmless beyond a reasonable doubt, see *United States v. Longee*, 603 F.2d 1342, 1345 (9th Cir. 1979), in light of the nature of the statements, the striking of the statements and instructions by the court, and the

overwhelming admissible evidence that also tied the defendants to one another. That other admissible evidence included Silverman's testimony about the cocaine purchase by Job a month earlier during which Tavelman was present; the identical Western Airlines' flight from Los Angeles to Reno (on which the defendants occupied first-class seats Nos. 4A and 4C); Job's statements and conduct at the hotel indicating the floor on which his friend was located; Tavelman's admission that he was an account, as Job had said, and from Los Angeles; and the cocaine laboratory found, as Job said it would be, in the bathroom of Tavelman's room. See *United States v. Buckner*, 610 F.2d 570, 574-75 (9th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S. Ct. 1646, 64 L. Ed. 2d 235 (1980).

V. ENTRAPMENT AND DUE PROCESS CHALLENGES

Both defendants contend that the government's role in "originating, conceptualizing, and engineering the entire plan" was entrapment. The defendants' entrapment defense fails factually because of the evidence adduced at trial. Government conduct which originates the criminal design and implants it in the mind of an innocent or unwilling defendant is entrapment. *Sherman v. United States*, 356 U.S. 369, 371-73, 78 S. Ct. 819, 820-21, 2 L. Ed. 2d 848 (1958). To determine whether the government has implanted a criminal design in the mind of an otherwise innocent defendant, the court considers:

> the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Govern-

ment; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government. *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926, 98 S. Ct. 2820, 56 L. Ed. 2d 769 (1978). The record supports the finding that there was no entrapment.

Alternatively, the defendants argue that the government's conduct in "originating, conceptualizing, and engineering the entire plan" was so shocking that it should offend the court's "sense of justice." The Third Circuit has held that outrageous and overreaching police involvement invalidated a conviction despite a showing of the defendant's predisposition. See *United States v. Twigg*, 588 F.2d 373, 378-80 (3d Cir. 1978). See also *United States v. Borum*, 584 F.2d 424, 427-30 (D.C. Cir. 1978). Although the record provides a basis for defendants' argument, it also satisfies us that the conduct complained of here does not reach that extreme area in which it is "outrageous" or "grossly shocking." See *United States v. McQuin*, 612 F.2d 1193, 1196 (9th Cir.), *cert. denied*, 445 U.S. 955, 100 S. Ct. 1608, 63 L. Ed. 2d 791 (1980); *United States v. Smith*, 538 F.2d 1359, 1361-62 (9th Cir. 1976).

VI. SUFFICIENCY OF THE TRAVEL ACT EVIDENCE

Defendants contend that the Travel Act contemplates convictions only for a continuous course of criminal conduct in interstate commerce and that such a continuous course was

not shown by the evidence. Defendants rely primarily on *United States v. Donaway*, 447 F.2d 940 (9th Cir. 1971). In *Donaway*, a Ninth Circuit panel found the placing of one bet to be a "sporadic Casual involvement" in, rather than a "continuous course" of, criminal activity proscribed by the Travel Act. *Id.* at 944.

Neither evidence of large-scale operations nor long-term duration is required to support a Travel Act conviction. *United States v. Cozzetti*, 441 F.2d 344, 348 (9th Cir. 1971). Instead, what must be shown is evidence of a continuous enterprise and one act in interstate commerce in furtherance of that enterprise. See *United States v. Teemer*, 214 F. Supp. 952, 958 (N.D. W.Va. 1963). Considering the quantity of cocaine involved in the prior transaction proved at trial, the jury could reasonably find a continuous course of criminal activity. Viewing the evidence in the light most favorable to the verdict, we do not find clear error. See *United States v. Anderson*, 642 F. 2d 281 at 284 (9th Cir. 1981). The defendants also contend that the evidence did not show a "continuous" use of interstate facilities. The statute does not, however, require such proof. Once a showing of a continuous enterprise is made, a showing of one transaction in interstate commerce is sufficient to sustain a conviction under section 1952(a). See, *e.g.*, *United States v. Teemer*, 214 F. Supp. at 958. We reject the defendants' contention.

VII. PROPRIETY OF SENTENCES AND SPECIAL PAROLE TERMS

A. Job's Sentence

Job contends first that he was incorrectly sentenced under 21 U.S.C. § 960 (1976), rather than under 21 U.S.C. § 846 (1976), on Count I. We reject the contention. He was not sentenced under 21 U.S.C. § 960 (1976), but only given a special parole term under that provision.

Job also contends that his consecutive sentences were illegally imposed because they arose from a single transaction and identical facts and because a conspiracy is not an offense punishable separately from one under the Travel Act. See *Iannelli v. United States,* 420 U.S. 770, 785 n. 17, 95 S. Ct. 1284, 1293 n. 17, 43 L. Ed. 2d 616 (1975); *United States v. Kearney,* 560 F.2d 1358, 1365-67 (9th Cir.), *cert. denied,* 434 U.S. 971, 98 S. Ct. 522, 54 L. Ed. 2d 460 (1977). Proof of a violation of 21 U.S.C. § 846 requires showing the elements of (1) an agreement to violate the statute (2) with intent to commit the underlying substantive offense and (3) a subsequent overt act in furtherance of that agreement. *E.g., United States v. Melchor-Lopez,* 627 F.2d 886, 890 (9th Cir.1980). Proof of a violation of 18 U.S.C § 1952 requires showing the elements of (1) interstate travel or use of an interstate facility (2) with intent to promote an unlawful activity and (3) an overt act in furtherance of the unlawful activity. *United States v. Wander,* 601 F.2d 1251, 1258 (3d Cir. 1979). The interstate element of section 1952 is not required under section 846 and the agreement element of section 846 is not required under section 1952. In the special context of narcotics offenses, we have recently held that convictions for conspiracy and the substantive offense under 21 U.S.C. §§ 841(a)(1), 846 (1976) are permissible. *United States v. Wylie,* 625 F.2d 1371, 1381 (9th Cir. 1980), *cert. denied,* ..... U.S. ..... , 101 S. Ct. 863, 66 L. Ed. 2d 804 (1981). By

analogy from *Wylie*, we uphold the convictions for conspiracy and Travel Act violations. See *United States v. Stevens*, 612 F.2d 1226, 1231 (10th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1113 (1980).

B. Both Defendants' Special Parole Terms

Job argues, and the government concedes, that the special parole terms imposed on both defendants under 21 U.S.C. § 846 (Count I) are improper under *Bifulco v. United States*, 447 U.S. 381, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980). In *Bifulco*, the Supreme Court held that section 846 does not authorize the sentencing court to impose a special parole term[2] on a defendant convicted of conspiracy to manufacture or distribute a controlled substance. *Id.* at 400-01, 100 S. Ct. at 2259. We therefore vacate the special parole terms imposed on both defendants.

Affirmed in part and vacated in part.

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[2]A "special parole term" is a term of two years' minimum imposed in addition to a term of imprisonment. If the special parole is violated, the original term of imprisonment may be increased by the period of the special parole term. See 21 U.S.C. § 841(b)(1)(B) (1976 & Supp. II 1978); *Bifulco*, 447 U.S. at 384-85, 100 S. Ct. at 2250-51.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JACK WILBUR TAVELMAN, Defendant-Appellant.

No. 80-1128.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN JOB, Defendant-Appellant.

No. 80-1129.

[FILED SEPTEMBER 25, 1981]

Before: SKOPIL and FARRIS, Circuit Judges, and BELLONI,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing of appellants Tavelman and Job. Judge Skopil and Judge Farris have voted to reject appellant Job's suggestion for rehearing en banc.

The opinion filed July 13, 1981 shall be amended as follows. Add the following paragraph after the first full paragraph on page 3548 of the slip opinion [page 12 of Appendix "B" –just prior to "IV. Admissibility of Co-defendants' Statements"].

> Nor are Tavelman's Fifth Amendment objections compelling. Even if he preserved them on the record, the district court's deter-

*Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

mination that Tavelman was not in custody prior to his formal arrest was not clearly erroneous.

The full court has been advised of the proposal to amend the opinion, and of appellant Job's suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petitions for rehearing are denied and appellant Job's suggestion for rehearing en banc is rejected. The opinion filed July 13, 1981 is amended as set forth above.

†

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the State of California, County of Riverside, employed in the County of Riverside, City of Corona, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on NOVEMBER , 1981, I served the WITHIN PETITION FOR WRIT OF CERTIORARI (STEVEN JOB v. UNITED STATES OF AMERICA) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, California, addressed to said parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOVEMBER , 1981, at CORONA, CALIFORNIA.

D. A. Standefer

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